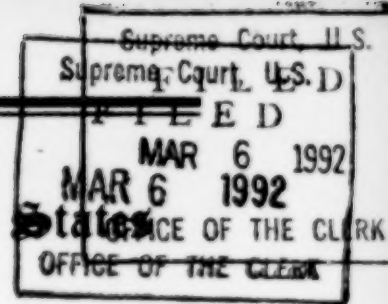


IN THE
Supreme Court of the United States
OCTOBER TERM, 1991



PROFESSIONAL REAL ESTATE INVESTORS, INC.,
AND
KENNETH F. IRWIN,
Petitioners,

v.

COLUMBIA PICTURES INDUSTRIES, INC.,
EMBASSY PICTURES,
PARAMOUNT PICTURES CORPORATION,
TWENTIETH CENTURY FOX FILM CORPORATION,
UNIVERSAL CITY STUDIOS, INC.,
WALT DISNEY PRODUCTIONS,
WARNER BROS., INC., AND
CBS INC.,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This Petition presents one issue: whether the Ninth Circuit misconstrued the sham exception to the *Noerr-Pennington* doctrine by refusing to consider any factual evidence that Respondents' failed copyright lawsuit was not pursued with a genuine desire to obtain a favorable judgment. Instead of considering evidence of actual intent, the court below summarily terminated its sham exception analysis after it concluded that the lawsuit, while ultimately unsuccessful, was not "baseless" as a matter of law (*i.e.*, that it satisfied the minimum requirements of pleading under Rule 11 of the Federal Rules of Civil Procedure).

This Petition asks whether a trial court may refuse to permit any discovery on the issue of actual intent and terminate sham exception analysis merely upon the reasoning that a failed lawsuit could not have been brought (1) to burden and harass the defendants; and (2) with indifference as to the lawsuit's result, if the unsuccessful claim was not "baseless" in the opinion of the court. This is an important issue because, as formulated, the Ninth Circuit's test would allow conspirators to file lawsuits designed solely to burden and harass competitors, so long as they state a colorable claim facially capable of passing an objective "not baseless" test.

In their Brief in Opposition, Respondents attempt to circumvent the narrow legal issue presented in this Petition by arguing about the very facts upon which Petitioners were denied discovery. Moreover, Respondents engage in an extensive discussion of several questions of fact that are irrelevant to sham exception analysis, including the alleged novelty, dif-

ficulty and notoriety of their unsuccessful copyright claim. Respondents observe that the trial judge stated that he thought the plaintiffs were "seeking and expecting a favorable result." Brief of Respondents in Opposition 3. From that statement, Respondents extrapolate that the decision of the court below was "routine," and that the circuits are "in complete harmony" regarding the appropriate test to apply in sham exception analysis.

This argument skirts the sole issue presented by this Petition—whether the trial court erred by making its sham exception finding without taking any evidence of actual intent. It is difficult to imagine a crisper or clearer record upon which to present this issue, which has divided the circuits for nearly twenty years:

- In the district court, Petitioners sought discovery of evidence of actual intent.
- The court granted Respondents' motion for summary judgment without allowing any discovery regarding actual intent.
- The Ninth Circuit affirmed, holding that discovery of actual intent is irrelevant where the trial court believes that the unsuccessful claim, as filed, was not baseless.

This Petition presents a narrow issue that has sharply divided the circuits—does subjective or true intent determine whether petitioning activity is a mere sham resulting in an abuse of process (as the Fifth, Sixth, and Seventh Circuits have ruled); or does objective or apparent intent control (as the Ninth Circuit so starkly ruled in this case); or is the proper test an amalgam of subjective and objective factors (as

other circuits have ruled). See Petition for Writ of Certiorari 19-21.

For these reasons, the Petition for Writ of Certiorari should be granted.

March 6, 1992

Respectfully submitted,

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